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IN THE

Supreme Court of the United States

October Term, 1963

No. 698

WORZ, INC., PETITIONER,
v.
FEDERAL COMMUNICATIONS COMMISSION
AND
MID-FLORIDA TELEVISION CORP.,
RESPONDENTS

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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WORZ, INC., Appellant below, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, entered in this case July 5, 1963, upon the Federal Communications Commission's report and recommendations following a remand (R. 154-157) of the case to the Federal Communications Commission with instructions (R. 156) that the Commission "hold with the aid of a specially appointed examiner, an evidential hearing to determine the nature and source of all '*ex parte*' pleas and other approaches

that were made to Commissioners while the proceeding was pending, and any other factors that might be thought to require either disqualification of some Commissioners from participating in the re-opened proceeding, or disqualification of some parties from receiving any award that may ultimately result".

However, the Court of Appeals retained jurisdiction of the proceedings (R. 157 and see 106 U. S. App. D. C. 14; 268 F. 2d 889).

OPINION BELOW

The opinion of the Court of Appeals (Appx. 1a, et sec.), and the supplemental opinion upon petition for rehearing *en banc* (Appx. 7a), have not yet been reported.

JURISDICTION

The judgement of the Court of Appeals was entered on July 5, 1963 (Appx. 6a). By order and supplemental opinion dated September 23, 1963, that Court denied Appellant's petition for a rehearing *en banc* (Appx. 7a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

Upon the opinions rendered by the Court of Appeals, we find that the following questions are presented:

1. Where the Court below improperly condoned, and improperly failed to find erroneous,

the action of the Commission in basing its findings on selected parts of the record and disregarding other parts which would require different findings, is the court below required, under the Administrative Procedure Act and under the *Universal Camera Corporation v. National Labor Relations Board*, 340 U.S. 474, to review the *whole* record?

2. Where a corporate party to an adversary proceeding seeks and attempts, *ex parte*, to influence, subvert, or corrupt the adjudicatory processes of a court or other tribunal, through its attorney or agent, is such corporate party barred from any relief in such proceeding whether or not its officers, directors, or stockholders knew of such acts or conduct of its attorney or agent, regardless of the degree of success achieved thereby?

3. Where a principal fails to disavow and repudiate the misconduct of its emissary, agent or attorney, which was in the furtherance of its interest, upon gaining knowledge thereof, is such principal deemed to have ratified and affirmed the actions and misconduct of such agents?

4. Where a trail examiner, who has been appointed with the consent of the parties and the approval of the United States Court of Appeals for the District of Columbia, renders purely factual findings and conclusions which are predicated upon his observation of witnesses and his determination of their *credibility*, does an administrative body have the authority to substitute its judgment, for that of the Examiner, as to the credibility of the witnesses and to set aside such Examiner's findings based thereon?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fifth Amendment to the Constitution of the United States provides, in pertinent part:

No person shall. . . be deprived of life, liberty, or property, without due process of law; . . .

Section 10(e) of the Administrative Procedure Act, "An Act to improve the administrations of justice by prescribing fair adminstrative procedure", 5 U.S.C. 1009, provided in pertinent part:

(e) Scope of review. - So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall . . . (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; . . . (5) unsupported by substantial evidence in any case subject to the requirements of Sections 7 and 8 or otherwise reviewed on the record of an agency hearing provided by statute; . . . in making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error.

STATEMENT OF THE CASE

This is the second time this case has been before the Supreme Court of the United States. Appellant appealed to the United States Court of Appeals for the District of Columbia Circuit from a Federal Communications Commission's decision released on June 7, 1957, denying Petitioner's application for a permit to construct a new commercial television station to operate on Channel 9 at Orlando, Florida, and granting the conflicting application of the Intervenor, Mid-Florida Television Corporation. In doing so, the Commission reversed[1] the Hearing Examiner's[2] Initial Decision (First United States Supreme Court Record, case Number 349, as filed on September 8, 1958, 70-136) proposed a grant of the WORZ application, his preference being based upon "many reasons" of which 12 were listed as being "the most important." First U.S.S.C. R., J.A. 133-136.) Mid-Florida was not accorded a single point of preference.

In its utter disregard for the record as a whole, the Court of Appeals for the District of Columbia Circuit affirmed, with a per curiam opinion, the

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[1] The first comparative hearing was held in December 1954 and March 1955. The Initial Decision was released on August 10, 1955. The Commission heard oral argument of June 18, 1956, and released its Decision on June 7, 1957. Mid-Florida, at its peril, elected to proceed with construction under its permit pending the outcome of review proceedings.

[2] The first Examiner, Basil P. Cooper, became a member of the Commission's lagal staff in January 1935, and, except for a period of military service, so continued until his appointment as an Examiner in July 1948. (FCC News Release, July 21, 1948.) His experience and integrity are well established.

Commission's Order granting the Mid-Florida application (103) U. S. App. D. C. 195, 257 F. 2d 199), despite WORZ's graphic showing, included in its ten appendices to its reply brief, exemplifying the Commission's disregard of the record. During the argument before that court *not one word was uttered by counsel for either the Commission or Mid-Florida* attacking the correctness of the appendices which showed that the Commission relied not upon the record but upon the suggestions of Mid-Florida or of the Commission's Broadcast Bureau as to the significant party-in-interest issue against WORZ.

Thereupon, Petitioner, on September 8, 1958 filed with the Supreme Court of the United States a petition for certiorari to the United States Court of Appeals for the District of Columbia Circuit. On October 27, 1958, the Supreme Court granted the certiorari and vacated the judgement of the said Court of Appeals and remanded the case (358 U. S. 55).

On May 21, 1959, the United States Court of Appeals for the District of Columbia Circuit vacated the Commission's Order granting the Mid-Florida application and remanded the case to the Commission with instructions as above stated.

In accordance with the mandate, the Commission, On July 29, 1959, re-opened the record and ordered a further hearing to determine four issues: (1) whether any Commissioners who participated in the grant to Mid-Florida should be disqualified from participating in the reopened proceeding, (2) whether there had been any at-

tempt to influence any Commissioner "except by the recognized and public processes of adjudication", (3) whether any party had "directly or indirectly secured, aided, confirmed, ratified, or knew of any misconduct or improprieties in connection with the proceedings", and (4) whether either of the applicants "should be disqualified from receiving a grant of its application" or be held guilty of conduct reflecting adversely upon such applicant from a comparative standpoint.

Thus the remand hearing did not require any particular expertise, but only experience in appraising witnesses, and separating facts from fiction, and the ability to determine whether there had been any attempt to influence any Commissioner "except by the recognized and public processes of adjudication", and whether any party had "directly or indirectly secured, aided, confirmed, ratified, or knew of any misconduct or improprieties in connection with the proceedings". The issues were essentially those of fact and involved the conduct of a proceeding under usual rules applicable to the administration of justice, followed by the determinations of a "specially appointed hearing examiner". Such determinations, obviously were to be governed by the "specially appointed examiner" and his appraisal of the witnesses whom he observed as they testified and noted their demeanor, their intelligence, and their prejudice together with their *interest in the outcome of the proceeding*.

After the remand of the case to hold the evidential hearing with the aid of a specially appointed hearing examiner, and to report to the United

States Court of Appeals for the District of Columbia Circuit, Honorable James D. Cunningham[3], Commission Chief Hearing Examiner, *with the consent of all the parties* including the Commission's general counsel,[4] was appointed and the appointment approved by Order entered by the said Court of Appeals March 16, 1961.

The Chief Hearing Examiner was not to submit a mere advisory report but was to render an initial decision, that is, to make findings of fact and reach conclusions of law - - to determine questions of both fact and law.

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[3] The second Examiner, James D. Cunningham, first became a member of the Commission's legal staff in 1934 and, except for a period of military service, so continued until his appointment as an Examiner in June 1947. He was elevated to the position of Chief Hearing Examiner in December 1954. (FCC Public Notice, December 9, 1954.) He and Mr. Cooper are probably the most experienced Examiners associated with the Commission. Col. Cunningham's position as Chief Hearing Examiner is evidence of the high regard in which he is held by the Commission, and his special selection to preside over the instant remand proceeding and the submission of his name to this Court are further evidence of the confidence which is reposed in him.

[4] It is important to note that the Office of the General Counsel participated most actively in the remand proceeding; in fact, the General Counsel's representatives carried the burden of presenting the evidence to make possible a determination of the issues, and in the course thereof introduced 25 Commission exhibits. In their proposed findings and conclusions of law they found that "one or more of the principals of Mid-Florida directly or indirectly secured, aided, confirmed, ratified, or knew of Dial's misconduct", and concluded that **Mid-Florida "should be absolutely disqualified from any further comparative consideration for Channel 9".** Ironically, the General Counsel must now espouse the opposite view — the view that the Commission adopted when it decided to adhere to its original determination in favor of Mid-Florida, reversing its first Examiner, and, to that end, also to reverse its second Examiner and to hold that he was wrong in not believing the Mid-Florida principals, and in

The factual phase of the proceeding was found to revolve about the so-called *Roth incident*, which was the reason for Mid-Florida's re-employment of one *William H. Dial*, an Orlando, Florida, attorney, who proceeded to make to then *Commissioner Richard A. Mack* the improper "ex parte" presentations while the matter was subjudice, which resulted in the Supreme Court's reversal of said Court of Appeals affirmance of the Commission's decision. It was upon the recommendation of Dial that the late Hyman N. Roth, also an Orlando attorney, was employed by the Mid-Florida group to organize the television corporation and make local contacts. He became the secretary, a director, and a stock subscriber, and testified in both the orginal and the remand proceedings.

As explained to the said Court of Appeals initially (1957 and 1958), the so-called Roth inincidently involved a letter dictated by Roth and sent to the Commission on November 3, 1953, just four days after he had completed the incorporation of Mid-Florida. It was written on the letterhead of the Orange County Bar Association, of which Roth was then President, and

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concluding that they knew of and ratified the proved improper ex parte presentations made by their attorney and agent in the furtherance of their cause. In other words, as far as the Commission is concerned, the Mid-Florida principals can do no wrong, and the Commission will hear no evil or see no evil about or in them, and will pay no attention to those who, through a sense of fair play and regard for the factual circumstances, speak "evil" of them. This seems particularly significant when it is recalled that, in the original proceeding, the Commission refused to accept the first Examiner's findings based upon his belief in the credibility of the WORZ principals and other witnesses called on behalf of WORZ.

bore the purported signature of Irving M. Felder, its Secretary. (First U.S.S.C. R., J.A. 41.) It even bore Mr. Felder's dictation symbols-"IMF". Mr. Felder denied that he signed it but stated that the signature "looks like mine". Roth, while not admitting that he simulated Felder's signature,[5] assumed full responsibility for the letter. (First U.S.S.C. R., J.A. 266-270.) It sought, as an official act of the Orange County Bar Association, to cast reflection upon WORZ, INC., through Mr. Murrell, Sr., a Jacksonville lawyer and the husband of the WORZ president. The first Examiner gave a substantial demerit to Mid-Florida for its effort thus *"to deceive and mislead the Commission"*. The Commission, however, while critical of Roth's conduct, observed that it was merely that "of a minor stockholder of the minority group, although an officer and director of the corporation" and that "There is also present the fact that Mr. Roth did have *some color or right to utilize the signature of the Bar Association President*".[7] (Emphasis supplied.)

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[5] WORZ Exhibits 21 and 22, First U.S.S.C. R., J.A. 16 and 41. Until its Report (R. 174, Par. 5), the Commission had religiously avoided the use of the word "forgery" in connection with Roth's action. Now it refers to Roth's **"quasi-forgery** of Felder's name (sic)".

[6] The first Examiner went on to say: "Prior to the close of the hearing, all officers, directors and stock subscribers of Mid-Florida knew or could have learned from reading the record that the Commission had been deceived and mislead by a principal officer and director of Mid-Florida. They have made no attempt to disavow the act of deceit practiced so successfully upon the Commission". (First U.S.S.C. R., J.A. 135.)

[7] By inadvertently using the title of "President" here the Commission actually spoke the truth, because that was Roth's official designation. However, the Commission no

The use of the phrase "color of right" shows the extent the Commission went to favor Mid-Florida. Obviously, there could be no "color of right" to forge Mr. Felder's signature and use his dictation symbols when the letter did not even concern the business of the Bar Association and would not have been written by Mr. Felder himself.[8] (Mr. Felder testified that he would not have written the letter because it was not Association business. Felder Dep., first U.S.S.C. R., J.A. 15.) Nonetheless the Commission then concluded that "the conduct of the principals of WORZ weigh much more heavily against a grant to that applicant than does that of Mr. Roth against grant of the application of Mid-Florida." (Dec. Concl., 76 first U.S.S.C. R., J.A. 308.) However, the Commission did admit that even *its* finding and conclusions did not warrant disqualification of WORZ. (Concl. 62, first U. S. S.C. R., J.A. 301.)

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doubt meant to say "Secretary", which was the title of Mr. Felder whose "signature" the Commission claims Roth had some "color of right" to use. The Commission never attempted to show why, if he had such "color of right", he should have not only forged Mr. Felder's signature rather than to write it in a normal manner but also have gone to the length of inserting Mr. Felder's dictation symbols.

[8] Mr. Felder testified that he would not have written the letter because it was not Association business. Felder Dep., (First U.S.S.C. R., J.A. 15.) The procedure used was obviously intended to deceive. Roth clearly acted in a despicable manner, and the other principals of Mid-Florida knew full well that he had done so, or should have known long before the record was closed. But not one of them uttered a word of surprise or disavowal either at that time or thereafter. As it turned out, the letter served its purpose because, apparently, it sparked the Commission's prejudice against WORZ.

After the issuance of the first adverse Initial Decision, the Mid-Florida principals became frantically concerned over the Roth incident and the importance that it might play in the ultimate decision. Thereupon, Joseph L. Brechner and John W. Kluge, officers, directors, and principal stock subscribers of Mid-Florida, re-employed William H. Dial, the Orlando attorney who had previously represented the group and who had proved to be an admirable "fixer". (In 1954 Dial had been retained by Mid-Florida in the defense of a suit brought by WORZ to have the corporation's stock subscription agreements declared void because of non-compliance with the Florida blue-sky laws. Through a lawyer friend, Dial was able to *induce* the Florida Securities Commission to go along with a nunc-pro-tunc procedure. Dial, after reporting the good news to Mid-Florida president Brechner, then wrote to his friend: "Mr. Brechner asks that I congratulate you and thank you for the fine work that you have done in inducing the Commission to go along on this basis." (WORZ Ex. C. R. 2.) They wanted Dial to investigate the Roth matter and learn, particularly, whether the local Bar Association contemplated any adverse action. In other words, Dial was to be their emissary - their secret agent to investigate and report. (Black's Law Dictionary, p. 616.). Dial, happily, proved to be an old friend of Commissioner Richard A. Mack. Following his investigation, Dial, at Mid-Florida's request and expense, came to Washington and, on October 17, 1955, met with Kluge, Brechner, and Paul Dobin, Mid-Florida Washington counsel, in Kluge's office. (R. 8.) Before

the meeting, Dial had attempted to reach Mack by telephone and had left a message. There is no question but that, during the conversation in Kluge's office, the Roth matter and the means of eliminating any prejudicial effect thereof upon the Mid-Florida application and the importance of doing so *prior to oral argument before the Commission* (held June 19, 1956) were thoroughly discussed, also that Dial received a call from Mack and they made a dinner engagement for that evening, of which fact he advised those in Kluge's office. (R 80.) Dial immediately thereafter went to work on Mack with his *ex parte* representations against WORZ and in favor of Mid-Florida.

Although Dial "hesitated to testify" that the Mid-Florida principals knew that *he intended to discuss the Orlando television case with Mack*, he "couldn't deny" the fact, and no one told him not to discuss the case with Mack (R. 81-82), and he knew that he told them that he was having dinner with Mack (R. 80-82.) Certainly, Mid-Florida had furnished him with copies of the Initial Decision and the pleadings so that he could be completely informed about the case. Furthermore, Dial felt that, as a friend of Mack, he could talk to him about anything, and that, even as a lawyer, he saw nothing improper in discussing the case with him. (R. -61.) It was, therefore, only natural and normal for him to have at least mentioned to his clients and friends, the Mid-Florida principals, his friendship with Mack and his intention to talk to him about their case and thus, possibly, to give it a much-needed boost. It was also only natural for Dial, at the

remand hearing, to endeavor to protect his former clients even though he may have had no personal interest in the outcome of the proceeding except, possibly, to try to make amends for having recommended to the Mid-Florida group their employment of Roth. Messrs. Brechner and Kluge, on the other hand, were *unusually* interested in the outcome of the case.

The Chief Hearing Examiner, after observing the witnesses and hearing all of the testimony, found as a fact (J.A. 23) that-

> "... The finding is here compelling, *notwithstanding the uncertainty of the testimony* of the four men (Dial, Kluge, Brechner, and Dobin), that, during the course of these discussions, *Dial informed the group of his telephone call from Mack and of their friendship and dinner engagement*. In light of the record as a whole, *any suggestion that the Mid-Florida principals were unaware of the existence of this friendship must be rejected.*" (Emphasis supplied.)

The decisions of the Court of Appeals for the District of Columbia allows the Commission to read into the record "some color of right" in favor of Roth's forgery of Felder's signature. In the first Examiner's preference for WORZ, and now read out of the record the second Examiner's rejection (R. 30) of the self-serving denials of Mid-Florida's principals "in the light of the record as a whole", as unreasonable, incredible, and contrary to normal human experience".[9]

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[9] "Although Dial considered his repeated 'ex parte' approaches to Mack wholly improper, he would not advise the

The decisions would permit the Commission for the second time to reverse a learned, respected, and experienced Examiner who felt obliged, after observing the witnesses as they testified, and considering the record as a whole, to come to a conclusion adverse to Mid-Florida, *although the Commission did not see them on the witness stand nor have an opportunity to judge their candor and demeanor.*

The Commission did agree with the second Examiner that neither WORZ, Inc., nor any of its principals, in the words of the Examiner (R. 31) "directly or indirectly, secured, aided, confirmed, ratified, or knew of any misconduct or improprieties in connection with the proceeding, and therefore, further found that this party is not disqualified from receiving a grant of its application."

This petition seeks review of a judgment (Appx. 6a) by the Court of Appeals for the District of Columbia Circuit upon the Federal

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Mid-Florida group under any circumstances that he made them or intended to do so. This circumstance would appear to be of significance herein, for if Dial had no compunction regarding these approaches and saw no impropriety in them since he was acting as a citizen of his community and not as the agent of representative of Mid-Florida, it is inconceivable and incredible that, in such a frame of mind, he would not and did not notify the Mid-Florida group by whom he had been retained and with whom he had been working closely, that, in the citizen's role, he was bringing to Mack's attention the importance of issuing the television permit to those who, in his judgment, would best serve the Orlando area. Obviously, while on the witness stand the individuals concerned were cognizant of the seriousness of the consequences which would attend a finding of knowledge of Dial's activities on the part of Mid-Florida." The Examiner thus points out the inconsistency and inherent improbability of the testimony.

Communications Commission's report and recommendations following remand to said Federal Communications Commission by said Court of Appeals on May 21, 1959, (R. 154) in which said Court of Appeals *first* accepted the majority conclusion of said Federal Communications Commission that upon reconsideration of the mutually exclusive applications of WORZ, Inc., a Florida Corporation, and Mid-Florida Television Corp., a Florida corporation, that neither Mid-Florida nor WORZ, Inc., is to be deemed automatically disqualified, and second, said Court of Appeals rejected the majority Commission recommendations that new consideration be merely "on the basis of the existing record, with no further hearing contemplated and with no demerit to Mid-Florida by reason of the evidence which came to light and resulted in the remand", and instead, specified that said Commission in its decision on all matters, should review and consider the record including all proceedings had upon the previous remand of said case by said Court of Appeals; and third, leave opinion to said Federal Communications Commission to decide in the first instance, whether Mid-Florida, Television Corp. could insulate itself by unawareness of the consequences of improper activities expended in its behalf by its attorneys, and finally, left up to the discretion of said Federal Communications Commission (1) a determination as to whether or not to reopen the record and permit the filing of new applications and their consideration upon a new record; (2) in making that detision, to reassess the qualifications of both Mid-Florida and WORZ, Inc.,

and (3) in reappraising said qualifications of said parties named. Federal Communications Commission should weigh the serious question as to the character of WORZ's principals; and at the same time, weigh the effect of Mid-Florida's acceptance of whatever deceptive activities Roth had engaged in, as found by the Commission, at the time he was secretary of and stock subscriber in Mid-Florida Television Corp., and also what effect the Commission would give to Roth's conduct and to Dial's *ex parte* activities in behalf of Mid-Florida, at the time he was acting as its attorney; (4) a decision by Federal Communications Commission after new oral argument on all aspects of all matters, whether or not a new public interest determination should be ordered, since the record is so stale, and finally, if so, acceptance of new applications from new untarnished applicants, and whether such new applications should require excluding the present parties from participation in the reopened proceedings. (R. 215-219.)

These decisions, in substance and effect, placed the mutually exclusive applications of WORZ, Inc., and Mid-Florida Television Corp., for a permit to construct a commercial television station to operate on Channel 9 in Orlando, Florida, back in the same status in which they stood prior to the decision of June 6, 1957, by which the Federal Communications Commission denied the application of WORZ, Inc., for a construction permit for a television station on Channel 9 in Orlando, Florida, and awarded the permit to another applicant, Mid-Florida Television Corp. (In re-applications of WORZ, Inc., et al., 22 F.

C.C. 1254.) In other words, the effect of the judgement of the Court of Appeals (Appx. 6a) was to return the proceeding which had a long and torturous course, extending over a period of approximately ten years, back to the point where it stood six years ago, and to deprive Petitioner of all of the fruits of litigation during the past six years, even though neither Petitioner nor its principals has ever been found guilty of any unlawful or improper conduct in said proceedings. In view of the fact that the Commission has (1) reversed two highly respected and experienced examiners who found for WORZ, and (2) has ignored the findings of the trier of fact as to credibility of the witnesses, and the *then* views of its Office of the General Counsel, which would void the award to Mid-Florida and disqualify the latter, it is highly unlikely that the further oral argument, presently scheduled for March 2, 1964, before the Commission, will result in a change of the Commission's position. To paraphrase an ancient addage, "What is past would surely seem to be prologue".

REASONS FOR GRANTING THE WRIT

First, Petitioner believes that the court below has failed to perform its statutory duty in reviewing the herein decision of the Federal Communications Commission. It has failed to require the Commission to make findings based upon the whole record and not merely upon those portions that suit its purpose. The decision below if permitted to stand, would have a serious impact upon procedure not only before the Commission but also before other Federal regulatory agencies

and upon the Constitutional and statutory safegards provided for persons regulated by such agencies.

Section 10(e) of the Administrative Procedure Act requires that the court "shall review the whole record or such portions thereof as may be cited by any party": This Court, in *Universal Camera Corporation v. National Labor Relations* Board, 340 U. S. 474, at 488, in referring to the Administrative Procedure Act, stated: "The substantiality of evidence must take into account whatever in the record fairly detracts from its weight. This is clearly the significance of the requirement . . . that courts consider the whole record."

As heretofore mentioned, petitioner, in its reply brief below, dated March 5, 1958, included ten appendices exemplifying the Commission's omission of parts of the record that detracted from the weight of the evidence which it incorporated in its findings upon the decisional question of the candor of the members of the Murrell family. The Commission considered so important those "factors not normally present in comparative hearings" that it devoted 23 findings (No. 32-55, first U.S.S.C. R., J.A. 213-228) and 20 conclusions (No. 48-68, first U.S.S.C. R., J.A. 294-304) thereto. Far more oral testimony was devoted to these factors than to the other phases of the case.[10] Therefore, the Commission had a large volume of material from which to se-

[10] The Record here includes the First and Second Joint Appendices below which contain 391 and 117 letter-size pages respectively, but does not include the many pages of the Commission's decision which were not necessary to a consideration of the points raised on appeal.

lect only that which supported its objective. The *per curiam* opinion of May 15, 1958, by implication, sanctions this practice and, unless this Court asserts itelf, the way will be open for a reversion to the pre-Administrative-Procedure-Act tendency to approve administrative findings if there be "substantial evidence" to support them regardless of the fact that there might be incontrovertible other evidence of record which would destroy it. *As stated by this Court in the Universal Camera case, supra, that was the reason for the insertion of Section 10 (e) requiring reviewing courts to consider the "whole record".*[11] This the lower court obviously failed to do.

Second, when a party to an adversary proceeding seeks and attempts, ex parte, to influence, subvert or corrupt the adjudicatory processes of a court or other tribunal, through its attorney or agent, such a party should be barred from any relief in such proceedings, whether or not its officers, directors or stockholders knew of such acts of conduct of its attorney or agent, and regardless of the degree of sucess achieved thereby, because only by such a rule can the purity and integrity of the adjudicatory processes of courts or other tribunals be preserved. In fact, the decision of the Federal Communications Commission and the Court of Appeals for the

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[11] In sole support of its inaction, the **per curiam** opinion cites **Tampa Times Co. v. Federal Communications Commission**, 97 U. S. App. D. C. 256. However, in that case the "crucial consideration" was admittedly the "Commission's judgment" upon the past record of the key figure in the successful corporate applicant. In this case it is not a question of the Commission's **permissable judgment** but of the Commission's **disregard of proved facts.**

District of Columbia Circuit imposed upon WORZ, the burden of establishing by direct evidence knowledge on the part of officers, directors or stockholders of Mid-Florida Television Corp., of the attempt by its attorney or agent, by means of its ex parte representations to a member of the Federal Communications Commission, to influence, subvert, or corrupt the adjudicatory processes of that tribunal, regardless of the fact that such matters were and are peculiarly and exclusively within the knowledge of Mid-Florida Television Corp., and its officers, directors or stockholders, and regardless of the fact that it is impossible, in any such case, to ascertain or determine with any degree of certainty, the extent to which such improper conduct did, in fact, influence the action of the Federal Communications Commission, and we respectfully submit that the rule announced in *Root Refining Co., v. Universal Oil Products Co.*, 169 F. 2d 514, requires that Mid-Florida Television Corp., upon the facts before the Federal Communications Commission, be absolutely disqualified from receiving the television grant or retaining the same, and be disqualified from further participation in said proceedings without regard to whether its opponent, WORZ, has been able to wring from the lips of the officers, directors, stockholders and attorney for Mid-Florida Television Corp. a full confession of the conduct of said Corporation's agent or attorney, and its effect upon the decision of the Federal Communications Commission.

Third, the decision of the Federal Communications Commission and the United States

Court of Appeals for the District of Columbia Circuit, by their respective decisions, have wholly failed to charge Mid-Florida Television Corp. with the consequences of the action and misconduct of its emissary, agent or attorney in the furtherance of its interest after gaining knowledge thereof, and thereby permitting Mid-Florida Television Corp. to retain the fruits of the wrongdoing of its agent and attorney, without the consequences thereof.

Fourth, the decision of the Federal Communications Commission overturned and refused to follow the findings and decisions of an Examiner appointed with the consent of the the parties and the approval of the United States Court of Appeals for the District of Columbia Circuit, and permitted the Federal Communications Commission to substitute its judgment for that of said Examiner as to the credibility of the witnesses who appeared personally before said Examiner, and thereby deprived the applicant, WORZ, of the full benefit of testimony and evidence produced before said Examiner. (See Kimberly v. Arms, 129 U. S. 513.)

The second Examiner's Findings as to the veracity of the Mid-Florida principals may not, in any event, be overruled without a very substantial preponderance of the testimony, and such preponderance is manifestly absent herein. In *Universal Camera Corp. v. National Labor Relations Board* (Feb. 1951), 340 U. S. 474, the Supreme Court observed (at 493) that, under the Administrative Procedure Act, as well as the Taft-Hartley Act, a reviewing court is to deter-

mine the *"substantiality of evidence on the record including the examiner's report"*. Later the Court said (at 496):

> "The 'substantial evidence' standard is not modified in any way when the Board and its examiner disagree . . . that evidence supporting a conclusion may be less substantial *when an impartial, experienced examiner who has observed the witnesses and lived with the case* has drawn conclusions different from the Board's than when he has reached the same conclusion. The findings of the examiner are to be considered along with the *consistency and inherent probability of testimony*. The significance of his report, of course, depends largely on the *importance of credibility* in the particular case . . . ". (Emphasis supplied.)

In that case the Court of Appeals (2nd Circuit) had affirmed the order of the National Labor Relations Board which had overruled the Examiner's findings of fact and his recommendation that the complaint be dismissed. *The Supreme Court remanded the case and stated (p 497) that the Court of Appeals should "accord the findings of the Trial Examiner the relevance that they reasonably command* in answering the comprehensive question whether the evidence supporting the Board's order is substantial." Upon reconsideration in the light of these instructions, the Court of Appeals through *Judge Learned Hand*, gave proper weight to the Examaminer's findings and reversed the Board's Order. In so doing, it stated that *"an Examiner's*

findings on veracity must not be overruled without a very substantial preponderance in the testimony as recorded", especially when the findings are "based on that part of the evidence which the printed words do not peserve". *National Labor Relations Board v. Universal Camera Corp.* (July 1951), 190 Fed. 2d 429, 430. This reasoning was followed in *N.L.R.B. v. Supreme Bedding & Furniture Manufacturing Co.* (4th Cir,:. 1952), 196 F. 2d 997, which reversed the Board's Order that had overruled its Examiner. The Court there held that *the Examiner had the superior opportunity to observe the witnesses and to determine their credibility.*

In the instant case the credibility of the witnesses, who were vitally interested in the outcome of the proceeding, is of great importance, and their testimony must be measured by its "inherent probability". And, to paraphrase the Supreme Court's statement in the *Universal Camera* case, because of the *"importance of credibility"* of the Mid-Florida principals, the determinations of the Chief Hearing Examiner take on added significance.

The Commission majority significantly makes no effort to rely upon a substantial preponderance of the testimony. This is because they must rely *only* upon the denials of the very witnesses who are so substantially interested in the outcome of the case, and who, to use the Examiner's words (R. 31, Par. 4), "were cognizant of the seriousness of the consequences which would attend a finding of knowledge of Dial's activities on the part of Mid-Florida."

As noted by the Chairman of the Commission in his dissent (R. 41): "The Examiner who heard and saw the witnesses found that responsible officers and stockholders of Mid-Florida knew of, and ratified, Mr. Dial's improper approaches. The record does not justify the majority's reversal of this finding." The Chairman went on to conclude (R. 41):

> "It is clear to me that the Examiner did not brush aside 'sworn denials' of Mr. Dial and the Mid-Florida witnesses on the basis of an indefinable 'human experience.'" (Majority Report and Recommendation, par. 12, p. 5.) The human experience on which he relied is the experience which all of us have had with the ways men act in circumstances such as those this record reveals. As between the common sense teaching of that experience and the *denials of heavily interested witnesses*, he chose to rely on common sense. So do I. (Emphasis supplied).

Thus the Chairman would follow normal and logical procedure and to the above extent would give to the determinations of the trier-of-the-facts the weight to which they are entitled and would also recognize that the trier-of-the-facts is not required to accept testimony which he does not believe, even though it be uncontradicted. This is particularly true where the witness is *interested in the outcome of the case. Young Ah Chor v. Dulles* (9th Cir. 1959), 270 F. 2d 338, 341.

CONCLUSION

We do not have here an ordinary case of "unclean hands", in which counterbalancing considerations of public interest in the service involved might justify awards despite misbehavior. This case concerns corrupt tampering with the adjudicatory process itself.

Therefore, in order that the constitutional and statutory standards of proceedings, as interpreted by this Court may be enforced, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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